NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
JUN 30 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2007-0179
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
DAVID ALLAN MORRISON,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063256

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and William Scott Simon — Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin — Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 Appellant David Morrison appeals his convictions for two counts of sexual assault. He argues the trial court erred by excluding evidence that the victim, who testified against him, had outstanding arrest warrants at the time the crime was committed. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408, *supp. op.*, 206 Ariz. 153, 76 P.3d 424 (2003). On August 22, 2006, K., a homeless woman, was sitting on a bench near the Tucson Convention Center (TCC), drinking vodka, when Morrison approached her and asked for directions. He joined her on the bench for about an hour and shared some of the vodka. After they had drunk all of it, K. stood up to leave. Morrison touched her arm, and she told him not to touch her. He then walked away. Because K. "was a little intoxicated" and feeling tired, she found a nearby patch of grass in a well-lit, highly trafficked area where she thought it would be safe to lie down and go to sleep. After falling asleep, she awoke to find a man on top of her. She told him to get off and then passed out again.

¶3 Around 6:30 p.m., a TCC security officer saw K. lying on the grass. Morrison was with her and was rubbing her thigh, but when the officer told him "stop being so amorous," he stopped. K. appeared to be "resting or sleeping" and did not move. The officer observed them again in the same position around 7:15 p.m. At 9:30 p.m., a Downtown Alliance security officer saw Morrison at the same location, straddling K. and

engaging in sexual intercourse. K. was lying on her back with her arms spread out, and she was naked except for a T-shirt pushed up around her neck. Her eyes were closed, and she was not participating in the sexual activity; indeed, she was not moving at all. The officer told Morrison to stop, but he did not react or disengage. The officer backed away to signal his partner to join him, and when the two of them approached, they saw Morrison performing cunnilingus on K., who was still not moving or responding in any way. The security officers called 911. When two police officers arrived around 9:45 p.m., Morrison had his head between K.'s buttocks, apparently performing anilingus. K. still was not moving.

¶4 One of the police officers ordered Morrison to stop. When he did not comply, the officer kicked Morrison's foot and he sat up. He denied knowing K. and said he "hadn't done anything." K. woke up after one of the officers spoke to her in a loud voice and tapped on her foot. K. was "scared, confused, [and] upset" and became increasingly upset while being questioned by the officers. At one point she appeared to stop breathing, and one of the police officers called an ambulance to take her to the hospital.

¶5 Morrison was charged with three counts of sexual assault: one count of engaging in an act of sexual intercourse without consent and two counts of engaging in an act of oral sexual contact without consent. A jury found him guilty of sexual intercourse without consent and one count of oral sexual contact without consent, but it acquitted him

of the other.[1] The court sentenced him to consecutive, presumptive, seven-year prison terms for each conviction, and this appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4033(A).

Discussion

¶6 Morrison's sole argument on appeal is that the trial court erred in precluding evidence that K. had outstanding warrants for her arrest at the time of these events. "Decisions on the admission and exclusion of evidence are 'left to the sound discretion of the trial court,' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). To the extent Morrison also contends the court's rulings violated his constitutional rights to due process and a fair trial, we note that the exercise of these rights at trial is "limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance." *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988).

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[1]It is not clear from the record exactly which conduct formed the basis of which of the two oral sexual conduct counts. The jury asked the trial court whether count two related to the act of cunnilingus and count three to anilingus. However, Morrison objected to the state's proposal to amend the indictment to conform with the jury's apparent interpretation of the two counts. The judge thus responded to the jury's question that they should "decide, if they can, which count goes to which body part based on the evidence presented." We note, however, that Morrison did not object to the phrasing of the indictment below or on appeal; thus we do not address this issue further. *See* Ariz. R. Crim. P. 13.5(e) (defects in charging documents must be raised in accordance with Ariz. R. Crim. P. 16); 16.1(b) (motions must be made no later than twenty days before trial).

¶7 Outstanding warrants constitute "other acts" evidence under Rule 404(b), Ariz. R. Evid. *State v. Henry*, 176 Ariz. 569, 579, 863 P.2d 861, 871 (1993). Pursuant to Rule 404(b), "evidence of a witness'[s] other acts is admissible . . . for some purpose other than showing that the witness acted in conformity therewith. Thus, evidence of other acts may be used to establish such things as the witness'[s] motive, intent, or plan." *Dickens*, 187 Ariz. at 13, 926 P.2d at 480. However, a trial court should only admit evidence of other acts if it is relevant and if its probative value is not substantially outweighed by the risk of unfair prejudice, confusion of the issues, or waste of time. Ariz. R. Evid. 401, 403; *State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997). This rule "applies to other acts of third persons as well as to those of defendants." *State v. Tankersley*, 191 Ariz. 359, ¶ 39, 956 P.2d 486, 496 (1998).

¶8 Morrison relies on cases from other jurisdictions for the proposition that we should apply a less restrictive standard of admissibility to so-called "reverse 404(b)" evidence, offered by the defense. *See United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984); *United States v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991); *State v. Garfole*, 388 A.2d 587, 591 (N.J. Super. 1978).[2] And we recognize our own courts have noted, in considering such evidence, "[o]ne of the prime considerations to be taken into

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[2]A fourth case cited by Morrison was decided in a jurisdiction where "the test for admitting other crimes evidence in criminal proceedings . . . does not apply to crimes, wrongs, or acts committed by anyone other than the defendant," *Sessoms v. State*, 744 A.2d 9, 13 (Md. 2000), a position clearly at odds with Arizona law. *See State v. Tankersley*, 191 Ariz. 359, ¶ 39, 956 P.2d 486, 496 (1998); *State v. Dickens*, 187 Ariz. 1, 13, 926 P.2d 468, 480 (1996).

account—possible prejudice against the defendant—is not present." *State v. Taylor*, 9 Ariz. App. 290, 293, 451 P.2d 648, 651 (1969).

¶9 These cases suggest trial courts should "rebalance the probative value of the evidence against the countervailing considerations, keeping in mind that prejudice to the defendant is not a factor when the defendant offers the other crimes evidence." *Stevens*, 935 F.2d at 1403. But they do not support Morrison's contention that there should generally be a more "relaxed standard" for the admission of such evidence when it is offered by the defendant. In particular, none of the cases cited by Morrison eliminates or modifies the threshold requirements that evidence be relevant and that its probative value not be substantially outweighed by the danger of confusion of the issues or waste of time. Indeed, both *Aboumoussallem*, 726 F.2d at 912, and *Garfole*, 388 A.2d at 592, upheld trial court findings that the probative value of proffered other-act evidence was substantially outweighed by the danger of waste of time and confusion of the issues. *See also Oliver*, 158 Ariz. at 30, 760 P.2d at 1079 (defendant's right to present evidence not absolute but limited to relevant, nonprejudicial evidence).

¶10 In this case, K. had two outstanding warrants for failure to appear in City Court after she had been arrested for consuming liquor in public and possessing marijuana. Morrison argued evidence of these warrants was probative of K.'s motive for alleging she had been sexually assaulted. According to Morrison's theory, K. lied about what had actually been a consensual sexual encounter in order to avoid arrest, at least in part because she did not want police officers to investigate whether there were any outstanding warrants for her

arrest. His counsel asserted, "[T]he jury may not believe this, but [I think] she thinks she's going to be arrested for being drunk in public again, and so they ask if he had her permission, so it's no, then she becomes the victim. She doesn't get a warrants check run." The trial court precluded the evidence, finding it was not relevant and describing Morrison's theory of its probative value as "speculation."[3]

¶11 Evidence is relevant when it has any tendency to make the existence of any fact in dispute more or less probable. Ariz. R. Evid. 401; *Lee*, 189 Ariz. at 599, 944 P.2d at 1213. When other-act evidence is offered to support a particular defense theory, the plausibility of the theory bears on the relevance and probative value of the evidence. *See State v. Hutchinson*, 141 Ariz. 583, 587, 688 P.2d 209, 213 (App. 1984), *citing State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976) (defense theory must be "credible" to admit evidence victim had previously made false rape allegations). And, when a defendant is permitted to inquire generally into a witness's motivation in testifying, the details of other acts underlying that motivation may be precluded as irrelevant. *State v. Doody*, 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996) (finding details of unrelated offenses committed by prosecution witness irrelevant to show witness's motivation for testifying, where trial court allowed defendant to explore motivation by cross-examining witness about favorable plea agreement).

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[3]The court did not preclude evidence that K. had a prior conviction for issuing a worthless check, but Morrison decided not to introduce this evidence to impeach K.'s truthfulness.

¶12 As the state correctly points out, Morrison failed to offer any evidence that K. was even aware the outstanding arrest warrants existed. Morrison counters that the trial court's ruling prevented him from ascertaining whether K. was aware of the warrants, given the right of victims to refuse to be interviewed by the defense. *See State v. Roscoe*, 185 Ariz. 68, 74, 912 P.2d 1297, 1303 (1996). But there is no record that Morrison had ever requested an interview with K. And, even if he had and if his request was rejected, he could have requested that the court call K. to testify on this issue at a hearing on the admissibility of the Rule 404(b) evidence. However, he failed to do so. *See State ex rel. Dean v. City Court of Tucson*, 173 Ariz. 515, 516-17, 844 P.2d 1165, 1166-67 (App. 1992) (Victims' Bill of Rights does not preclude trial court from ordering alleged victim to appear and testify at pretrial hearing).

¶13 Furthermore, we note that Morrison had other, nonprecluded avenues to challenge K.'s credibility on cross-examination. In particular, he could have suggested she had fabricated her story because she wished to avoid arrest, without making any reference to the warrants. However, he failed to pursue such questioning. *See State v. Harris*, 151 Ariz. 236, 237, 727 P.2d 14, 15 (1986) (defendant who chose not to pursue line of questioning on issue not prevented from presenting defense based on that issue).

¶14 Thus, the trial court did not bar Morrison from pursuing a general line of questioning regarding K.'s motivation to lie. *See Doody*, 187 Ariz. at 374, 930 P.2d at 451. And there is no evidence in the record to support Morrison's theory that K. had a motivation to lie based on the outstanding arrest warrants. Therefore, we agree with the trial court's

description of his theory as nothing more than speculation. *See State v. Grice*, 123 Ariz. 66, 70, 597 P.2d 548, 552 (App. 1979) ("From all that appears in the record, the plot conceived by appellant existed only in the mind of his counsel."). The trial court did not abuse its discretion in precluding evidence of the outstanding warrants for lack of relevance. *See Ayala*, 178 Ariz. at 387, 873 P.2d at 1309.[4]

Disposition

¶15 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge

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[4]Morrison argues the evidence should have been admissible if, as the state apparently concedes, it could have been even "minimally probative." But the trial court already had found the evidence "irrelevant." And, in any event, given the uncontradicted testimony of multiple witnesses that, throughout the incident, K. was motionless, her eyes were closed, and she was not participating in the sexual acts being performed on her by Morrison, we cannot find that Morrison was prejudiced by the court's decision. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.").